



CALIFORNIA STATE BOARD OF EDUCATION

SEPTEMBER 2004 AGENDA

SUBJECT

Special Education: Adopt Title 5 Regulations (Sections 3088.1 and 3088.2) regarding withholding funds to enforce special education compliance

- ☒ **Action**
- ☒ **Information**
- ☐ **Public Hearing**

RECOMMENDATION

Adopt Title 5 Regulations (Sections 3088.1 and 3088.2) regarding withholding funds to enforce special education compliance.

SUMMARY OF PREVIOUS STATE BOARD OF EDUCATION DISCUSSION AND ACTION

The State Board of Education (SBE) at the January 2004 meeting approved the commencement of the rule making process for the proposed regulation. Staff was directed to conduct a public hearing on March 8, 2004, at 8:00 a.m. Substantial changes were made to the regulations as a result of the public comments received. The SBE at the May 2004 meeting directed staff to begin the rulemaking process for the revised regulations. Staff was directed to provide a 45-day public comment period from May 21 through July 6 and conduct a public hearing on July 6, 2004, at 8:00 a.m. Though two people attended the public hearing, no one made any comments at the hearing. Based on several written comments received during the public comment period, modified language for regulations 3088.1 and 3088.2 was recommended which the SBE approved at the July 7, 2004 meeting. The SBE directed that the proposed amendments be circulated for a 15-day public comment period. The public comment period was held from July 14 through July 28 in accordance with the Administrative Procedure Act. The Final Statement of Reasons (attachment 1), provides a summary of comments received with written responses.

SUMMARY OF KEY ISSUES

20 USC Section 1413 requires, among other things, that state education agencies monitor local educational agencies to assure compliance with special education laws. 34 CFR 300.197 and *Education Code* Section 56845(a) and (b) authorize the State Superintendent of Public Instruction (SSPI) to withhold state and federal funds from a local education agency after reasonable notice and opportunity for a hearing if the SSPI finds the agency out of compliance with special education laws.

This proposed regulation is developed in response to the U.S. Department of Education, Office of Special Education Policy (OSEP) expectation that state education agencies have a full continuum of enforcement options to compel compliance with special education laws. Section 3088.1 specifies the required contents of a hearing notice and the timelines for conducting the hearing prior to making a decision whether to withhold funds. Section 3088.2 specifies when funds shall be withheld if the hearing officer concludes that the local educational agency has not presented sufficient proof of compliance or mitigating circumstances precluding compliance. This section also stipulates that the SSPI may apportion state and federal funds previously withheld from the local education agency when it is determined that substantial progress toward compliance with special education laws has been made.

FISCAL ANALYSIS (AS APPROPRIATE)

The proposed regulations would create a new program or higher level of service in an existing program. The activities specified in the regulations are necessary in order to implement the federal and state statutes. Any cost associated with the activities are attributable to the federal statute and are therefore not reimbursable. It is believed that any additional state costs could be absorbed within the existing department resources and budget.

ATTACHMENT(S)

Attachment 1: Final Statement of Reasons (6 Pages)

Attachment 2: Proposed Title 5 Regulations, sections 3088.1 and 3088.2 (3 Pages)

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

Regulation sections 3088.1 and 3088.2

The proposed regulations are developed in response to the U.S. Department of Education, Office of Special Education Policy (OSEP) expectation that state education agencies have a full continuum of enforcement options to compel compliance with special education laws.

Section 3088.1 of the regulations specifies the required contents of a hearing notice and timelines for conducting the hearing prior to making a decision whether to withhold funds. Section 3088.2 specifies funds shall be withheld if the hearing officer determines that a preponderance of the evidence supports the Department's findings of noncompliance and withholding of funds is appropriate in the particular circumstance. The section also stipulates that the Superintendent may apportion state and federal funds previously withheld from the local education agency when it is determined that substantial progress toward compliance with special education laws has been made.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF MAY 21, 2004 TO JULY 6, 2004.

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, and Ronald Wenkart, General Counsel for the Orange County Office of Education, each submitted separate comments and legal arguments concerning the definition of "substantial noncompliance" found in Section 3088.1(a). They propose that "substantial noncompliance" be defined using language derived in case law from Amanda J. v. Clark County School District, 267 F. 3rd 877 (9th Cir. 2001). The court stated, "Substantial noncompliance means an incident of significant failure to provide a child with a disability with a free appropriate public education or an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program."

Response: As described above, these comments are persuasive and the regulation Section 3088.1 shall be amended to add the following language to define substantial noncompliance, "an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program."

Final Statement of Reasons
Attachment 1
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Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, and Ronald Wenkart, General Counsel for the Orange County Office of Education, each submitted separate comments concerning Section 3088.1(f). Mr. Wenkart proposed the language of this section be amended to, "Technical rules of evidence should not apply to the hearing, but relevant written evidence or oral testimony may be admitted and

given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely on the conduct of serious affairs. A decision of the hearing officer to withhold funding shall be supported by substantial evidence produced at the hearing showing that the local education agency was in substantial noncompliance with a provision of law regarding special education and related services or a corrective action order by the Department of Education that complies with laws regarding special education and related services. No decision to withhold funds shall be based solely upon hearsay evidence. All findings of the hearing officer shall be based solely on the evidence presented at the hearing.” Mr. Reed states that, “it is essential that the regulations reflect that the evidentiary standard used at a hearing be clearly based on evidence and not hearsay.”

Response: Some of the proposed language for Section 3088.1(f) is found in *Education Code* Section 48918(h) regarding the technical rules of evidence. It is agreed that a decision to withhold funds should not be based solely upon hearsay evidence. Section 3088.1(f) shall be amended to read, “Technical rules of evidence should not apply to the hearing, but relevant written evidence or oral testimony may be submitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the hearing officer to withhold funding shall not be based solely on hearsay evidence but must be supported by evidence produced at the hearing showing substantial noncompliance with the provisions of special education law. Local education agencies may be represented by counsel and the hearings will be open to the public.”

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, comments, “the need to note exceptions to a Local Education Agency (LEA) completing corrective action within the timeline stipulated by the California Department of Education (CDE).” He further notes that currently the Focused Monitoring Technical Assistance (FMTA) Unit within the CDE informally allows for brief extensions beyond the typical timeline.

Response: In addition to the FMTA unit being able to informally grant extensions beyond the typical timeline, Section 3088.1(d) contains the provision that the hearing officer may grant extensions for good cause. This provides adequate protection to all parties in the event that exceptional circumstances cause delays and prevent timely completion of correction actions.

Comment: Kevin Reed, General Counsel for the Los Angeles Unified School District, comments that substantial progress toward compliance with the law needs to be objectively defined and that the permissive nature of the regulations with regard to restoring funds has the potential to further damage the ability of the LEA to carry out its responsibilities. Carol Bartz, Senior Director of the North Inland Special Education Region, also comments that the language in Section 3088.2(b) should be changed from “may” to “shall” with regard to the superintendent being mandated to apportion previously withheld funds.

Response: With respect to the permissive language contained in regulation Section 3088.2(b) this reflects the language found in *Education Code* Section 56845(b). Given the scope of the hearing and the expertise of the hearing officer, it is expected that the hearings will be factually and legally complex. When a finding of substantial noncompliance is made, the hearing officer shall include information about the steps that the local educational agency can take to remedy that finding. It therefore seems appropriate to allow the hearing officer to define “substantial progress” based on the specific circumstances raised during the hearing rather than attempt to include a generic definition in the regulations.

Comment: Carol Bartz, Senior Director of the North Inland Special Education Region, also comments that the language in Section 3088.1(d) which states, “the hearing officer should have experience in special education and administrative hearing procedures.” could be interpreted that the hearing officer could only be someone from McGeorge School of Law Special Education Hearing Office.”

Response: This language is to assure that the hearing officer is qualified and knowledgeable to conduct special education hearings and not to limit selection of hearing officers to one source. There are hearing officers who meet these criteria that are not from McGeorge School of Law Special Education Hearing Office.

Comment: Jeff Thom, president of the California Council of the Blind commented that the council is extremely supportive of these proposed regulations.

Response: CDE is pleased to hear of the support of these regulations from the California Council of the Blind.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. commented that, “In 5 CCR Section 3088.1(a), there is no reference to noncompliance with due process hearing decisions (2nd sentence) and the application and definition of a “substantial compliance” standard is overly restrictive (last sentence). First, the California *Education Code* (56845(a)(2)) specifically contemplates withholding for failure to implement the decision of a due process hearing officer based on noncompliance with provisions of *Education Code*, Part 30-Special Education Programs, Individual with Disabilities Education Act (IDEA) and implementing state and federal regulations which results in the denial of, or impedes the delivery of, a free appropriate public education for an individual with exceptional needs. Note that, consistent with 20 USC Section 1413(d), the withholding intended under subparagraph (a)(2) of the *Education Code* is triggered by noncompliance—not substantial noncompliance—when a local educational agency fails to implement a hearing decision concerning Free and Appropriate Public Education (FAPE) for an individual student.”

Response: Noncompliance does initiate the implementation of imposing sanctions as the regulations are currently written. To include language in the regulations that withholding would always occur in every case where noncompliance was established for

an individual student, especially in a very large district that is serving thousands of students with a disability, would be unreasonable and harmful to the provision of FAPE for the other students with disabilities in that district who are being appropriately served. The fact that the courts have defined “substantial noncompliance” in Amanda J. v. Clark County School District, 267 F. 3rd 877 (9th Cir. 2001) is an indication that applying the standard of “substantial noncompliance” is reasonable and fair.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. also commented, “Second, even where “substantial noncompliance” may be appropriately applied, it does not concern delivery (an incident of significant failure) of FAPE, but rather compliance with the Department of Education corrective action orders. Moreover, the terms “history of chronic noncompliance” and “systemic agency-wide problem noncompliance” establish a standard that is difficult to interpret and arguable goes beyond what was intended by the Legislature.”

Response: Given the scope of the hearing and the expertise of the hearing officer, it is expected that the hearings will be factually and legally complex. When a finding of substantial noncompliance is made, the regulation language does not prevent the hearing officer from considering any Department of Education corrective action orders in addition to establishing what constitutes a “history of chronic noncompliance” and “systemic agency-wide problem noncompliance” based on the specific circumstances raised during the hearing. A generic definition of these terms is not included in the regulations for that reason.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. finally commented, “we are concerned about the deletion of the regulatory language in the January 23, 2004 notice that limited the scope of the hearing officer’s review to determine the sufficiency of proof of corrective action by a local educational agency. Section 3088(a)(3) of the earlier rule stated that a hearing shall not reopen any finding of noncompliance or any corrective action that has been ordered. That provision has been omitted from the current version, which will result in an unduly prolonged hearing process.”

Response: There are substantial legal arguments why funds should not be withheld unless an LEA has been afforded the opportunity for a full evidentiary hearing on the underlying findings of noncompliance made by the Department of Education in Virginia Dept. of Education v. Riley, 23 F.3rd 80 (4th Cir. 1994). The regulations have been revised to expand the scope of the hearing to allow LEAs to contest the underlying compliance findings consistent with this case law interpreting the federal statute.

COMMENTS RECEIVED DURING THE PERIOD THE 15-DAY NOTICE AND PROPOSED REGULATION TEXT WAS AVAILABLE TO THE PUBLIC.

The modified text was made available to the public from July 14, 2004 through July 28, 2004, inclusive. The State Board of Education received the following comments:

Comment: Ronald Wenkart, General Counsel for the Orange County Office of Education, commented, "The revised regulations incorporate a number of our suggestions with regard to the definition to "substantial noncompliance" and the evidentiary standard to be used at the hearing. We believe that the regulations, as adopted, are a great improvement over the prior drafts and are fair and reasonable."

Response: The Department of Education is pleased that the Orange County Office of Education believes that regulations are currently written are fair and reasonable.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. commented in correspondence dated July 28, 2004 "We have reviewed the proposed changes promulgated on July 14, 2004 and continue to be seriously concerned about the language which has been added and deleted since the March 2004 hearing. (See our comments of July 6). With regard to §3088.1(a), the proposed added language partially addresses our comment about the overly restrictive language in the definition of "substantial noncompliance." However, we reiterate that there is no reference to noncompliance with due process hearing decisions (2d sentence) and the application and definition of a "substantial compliance" standard remain overly restrictive (last sentence)."

Response: This is essentially the same comment expressed by Mr. Rosenbaum in his comments of July 6 that we have already responded to above.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. also commented in correspondence dated July 28, 2004 that, "even where "substantial noncompliance" may be appropriately applied, it does not concern delivery ("an incident of significant failure") of FAPE, but rather compliance with Department of Education corrective action orders. Moreover, the terms "history of chronic noncompliance" and "systemic agency-wide problem noncompliance" establish a standard that is difficult to interpret and arguably goes beyond what was intended by the Legislature."

Response: This is the identical comment expressed by Mr. Rosenbaum in his comments of July 6 that we have already responded to above.

Comment: Stephen Rosenbaum, Associate Managing Attorney for Protection and Advocacy, Inc. finally commented in correspondence dated July 28, 2004 that, "we are concerned about the deletion of the regulatory language in the January 23, 2004 notice that limited the scope of the hearing officer's review to determining the sufficiency of proof of corrective action by a local educational agency. Section 3088.1(a)(3) of the earlier rule stated that a hearing "shall not reopen any finding of noncompliance or any corrective action that has been ordered." That provision has been omitted from the current version, which will result in an unduly prolonged hearing process."

Response: This is the identical comment expressed by Mr. Rosenbaum in his

comments of July 6 that we have already responded to above.

ALTERNATIVES DETERMINATION

The SBE has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

7-29-04

Title 5. EDUCATION

Division 1. State Department of Education

Chapter 3. Handicapped Children

SUBCHAPTER 1. SPECIAL EDUCATION

Article 7. Procedural Safeguards

Add §§ 3088.1 and 3088.2 to read:

§ 3088.1. Sanctions: Withholding Funds to Enforce Special Education

(a) When a district, special education local plan area, or county office of education fails to comply substantially with a provision of law regarding special education and related services, the superintendent may withhold funds allocated to such local agency under Chapter 7.2 (commencing with Section 56836) of Part 30 of the Education Code and the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.). Such noncompliance may result from failure of the local agency to substantially comply with corrective action orders issued by the Department of Education in monitoring findings or complaint investigation reports. "Substantial noncompliance" means an incident of significant failure to provide a child with a disability with a free appropriate public education, an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance.

(b) Prior to withholding funds, the department shall provide written notice to the local educational agency, by certified mail, of the noncompliance findings that are the basis of the Department's intent to withhold funds. The notice shall also inform the local agency of the opportunity to request a hearing to contest the findings and the proposed withholding of funds.

(c) The notice shall include the following information:

(1) The specific past and existing noncompliance that is the basis of the withholding of funds.

(2) The efforts that have been made by the Department to verify that all required

1 corrective actions have been taken.

2 (3) The specific actions that must be taken by the local educational agency to bring it
3 into compliance by an exact date to avoid the withholding of funds.

4 (d) The local educational agency shall have 30 calendar days from the date of the
5 notice to make a written request for a hearing. The department shall schedule a hearing
6 within 30 days of receipt of a request for hearing, and notify the local agency of the time
7 and place for hearing. A hearing officer with experience in special education and with
8 administrative hearing procedures shall be assigned by the department to conduct the
9 hearing and make an audio recording of the proceeding. The hearing officer may grant
10 continuances of the date for hearing for good cause.

11 (e) The local education agency shall have the opportunity, prior to the hearing, to
12 obtain all documentary evidence maintained by the Department's Special Education
13 Division that supports the findings of noncompliance at issue in the notice of intent to
14 withhold funds.

15 (f) Technical rules of evidence shall not apply to the hearing, but relevant written
16 evidence or oral testimony may be submitted, and given probative effect only if it is the
17 kind of evidence upon which reasonable persons are accustomed to rely in the conduct
18 of serious affairs. A decision of the hearing officer to withhold funding shall not be based
19 solely on hearsay evidence but must be supported by evidence produced at the hearing
20 showing substantial noncompliance with the provisions of special education law. Local
21 education agencies may be represented by counsel and the hearings will be open to the
22 public.

23 (g) If a hearing is not requested, the Department shall withhold funds as stated in the
24 notice. If a hearing is held, a written decision shall be rendered within 30 calendar days
25 from the date the hearing is held.

26 NOTE: Authority cited: Section 33031, Education Code. Reference: Section 56845(a),
27 Education Code.

28
29 **§ 3088.2. Enforcement and Withholding of Funds.**

30 (a) The hearing officer shall determine, based on the totality of the evidence,
31 whether a preponderance of the evidence supports the Department's findings of

1 noncompliance and the determination that withholding of funds is appropriate in the
2 particular circumstances of the case. The hearing officer's decision shall be the final
3 decision of the Department of Education.

4 (b) If the Superintendent of Public Instruction determines, subsequent to withholding
5 funds, that a local educational agency has made substantial progress toward
6 compliance with the state law, federal law, or regulations governing the provision of
7 special education and related services to individuals with exceptional needs, the
8 superintendent may apportion the state or federal funds previously withheld to the local
9 educational agency.

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11 NOTE: Authority cited: Section 33031, Education Code. Reference: Section
12 56845(b), Education Code.

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